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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1961.

No. 210 1

PHILIP A. FOLEY,
Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

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PHILIP A. FOLEY,
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UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in this case on May 12, 1961.

OPINION BELOW.

The opinion of the Court of Appeals (Appendix, infra., p. 17) is not yet reported.

JURISDICTION.

The judgment of the Court of Appeals was entered on May 12, 1961 (Appendix, infra., p. 31). A timely petition for rehearing was overruled on June 7, 1961. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED.

(1) Whether in a prosecution under a felony indictment for tax evasion under § 145 (b) of the 1939 Internal Revenue Code, the trial court is required by Rule 31 (c) of the Federal Rules of Criminal Procedure to give a requested misdemeanor instruction under § 145 (a) of the 1939 Internal Revenue Code, and thus allow the jury to determine whether the defendant committed the greater or lesser offense.

(2) Whether the statute removing the common law interest disqualification of a criminal defendant as a witness permits the trial court in its jury instructions to single out the defendant's interest in the outcome of the case.

(3) Whether a tax evasion indictment should be dismissed because of lack of prosecution if there is a long delay between the conclusion of the criminal investigation and the return of the indictment.

STATUTES AND RULES INVOLVED.

Rule 31 (c), Federal Rules of Criminal Procedure, provides:

Conviction of Less Offense. The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.

26 U. S. C., former § 145, provides:

(a) **Failure to file returns, submit information, or pay tax.** Any person required under this chapter to pay any estimated tax or tax, or required by law or regulations made under authority thereof to make a return or declaration, keep any records, or supply any information, for the purposes of the computation, assessment or collection of any estimated tax or tax imposed by this chapter, who willfully fails to pay such estimated tax or tax, make such return or declaration, keep such records or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties, provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.

(b) **Failure to collect and pay over tax, or attempt to defeat or evade tax.** Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

18 U. S. C. A., § 3481, provides:

> "In trial of all persons charged with the commission of offenses against the United States * * * the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him."

The Sixth Amendment to the United States Constitution provides, in part:

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial * * *."

Rule 48 (b) of the Federal Rules of Criminal Procedure provides:

"If there is unnecessary delay in presenting a charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint."

STATEMENT.

On February 5, 1959, petitioner was indicted in the United States District Court for the Eastern District of Missouri on two counts alleging the wilful attempt to evade income taxes of himself and his wife for the years 1952 and 1953 by filing fraudulent tax returns (R. 1).* The amounts of net income and the tax liability thereon as reported in the returns and as established by the proof were as follows (Tr. 22, 25-27, 1053-1058):

	Net Income		Tax Liability	
Year	Reported	Proof	Reported	Proof
1952	$4,053.27	$8,036.04	$ 500.22	$1,438.06
1953	$4,231.34	$9,700.89	$ 672.96	$2,017.26

Petitioner's pre-trial motion to dismiss the indictment, alleging an unreasonable delay in presenting the matter to the Grand Jury which constituted a denial of his right to a speedy trial, was denied after a hearing (R. 19-37). After a jury trial petitioner was found guilty. On July 8, 1960, petitioner was sentenced to a prison term of three years

* The record is in eight volumes. Volume one, containing the original papers and pretrial proceedings, is separately paginated and will be referred to as "R." Volumes two through seven, containing the transcript of the trial testimony, will be referred to as "Tr". Volume eight covers the proceedings in the Court of Appeals.

and fined $2,500.00 on Count I, and to a concurrent term of three years plus a fine of $2,500.00 on Count II (Tr. 49).

Petitioner is a lawyer, the bulk of his practice consisting of divorce cases and the defense of persons accused of crimes (Tr. 1079). Petitioner's income was proved by stipulation and testimony. It was stipulated that 58 clients had paid petitioner legal fees during the period involved (Tr. 944-948, 950-961, 968-1009). Testimony of 113 former clients and others also related to the payment of legal fees which were not disputed (Tr. 187-206, 255-261, 269-300, 304-344, 380-401, 404-501, 578-931). It was also stipulated that 7 attorneys who had officed with petitioner paid him $2,254.63 in 1952 and $2,637.39 in 1953 as their share of rent, secretarial assistance and office expense but these amounts, while not reported as gross income, were not deducted as business expense (Tr. 46, 932-943).

Concededly, petitioner failed to keep adequate records for the purpose of recording his income and deductible expenses. He testified that he determined his income by totalling the deposits in his bank book, deducting therefrom non-taxable items and adding an arbitrary amount, between $1,500 and $2,100, estimated by him to represent cash receipts (Tr. 1075-1078, 1081).

Petitioner only controverted the testimony of Roy Graham, a professional bondsman and tavern operator. In 1952 Graham gave petitioner the amounts represented by five checks totalling $2,837.35, and in 1953 the amounts represented by five checks totalling $3,154.38. The checks, dated between May 19, 1952 and August 5, 1953, issued by Graham to petitioner as payee, endorsed by petitioner, were all deposited by Graham in his tavern's bank account (Tr. 504, 508, 510-512, 519-524, 1102-1114; Exhibits 26-35). Graham testified that petitioner had represented him, giving him legal advice since 1933 without compensation; that in 1952, although Graham had a net worth of

$100,000, he first was in a financial position to pay petitioner, and, although not requested to do so, he paid petitioner the amounts represented by the checks. These checks were charged to Graham's bond account, the records of which were destroyed by Graham after an examination by the Internal Revenue Service. Graham denied that he had a partnership with petitioner in the bond business in which the latter was to receive one-half of the net income derived by Graham from signing appearance bonds (Tr. 529, 531-533, 542-543, 546, 557-566, 571-575). Petitioner's version of his relationship with Graham was that he had been instrumental in establishing the bail bond business for Graham by prevailing on the County Sheriff to accept his qualifications, that Graham and he had agreed to be partners in the bond business, that it was agreed that they were to split all net bond income with Graham deducting all expenses prior to paying petitioner and with Graham paying petitioner's share of the tax on the income received by petitioner, making this income tax free (Tr. 1098-1099, 1176-1177), that Graham paid him in cash and that the checks endorsed by petitioner and returned to Graham for deposit in the tavern account represented the cash that petitioner received (Tr. 1102-1112).

The trial judge, in its instructions to the jury, stated in regard to petitioner as a witness (Tr. 1311):

> "When a defendant in a case of this kind takes the stand—which he has a perfect right to do—he is subjected to all the obligations of a witness, and his testimony is to be treated like the testimony of any other witness; that is to say, it will be for you to say, remembering the matter of his testimony, and the manner in which he gave it, his cross-examination, and everything else in the case, whether or not he told the truth. Then, again, it is for you to remember—you

have a perfect right to do so, and it is your duty to do so—the very vital interest the defendant has in the outcome of this case.

"Now, this does not mean, and I do not mean to imply that whenever a man is accused of a crime and takes the stand in behalf of himself, that he will naturally commit perjury; but, of course, as a defendant places himself as a witness upon the witness stand, he stands like any other witness.

"But, his interest, or bias, or anything else that may affect his testimony, is a matter which, of course, you as jurors should consider. Therefore, I say to you, in considering the testimony of the defendant, you are to consider the very vital interest which he has at stake in this case."

The Court denied petitioner's requests that the jury be instructed that it might find him guilty of a lesser offense—specifically the misdemeanor of willfully failing to supply information, keep records or pay the correct tax under Section 145 (a) of the 1939 Internal Revenue Code (Tr. 1317).

By pre-trial motion, petitioner urged that the indictment be dismissed on the ground that he was denied his right to a speedy trial in that there was an unreasonable delay in presenting this matter to the grand jury. The evidence adduced showed that the criminal investigation was commenced on January 6, 1954 by a Special Agent, Internal Revenue Service and an Internal Revenue Agent (R. 19, 27; Tr. 156). Shortly after the initial contact, petitioner told the agents his method of preparing his returns (Tr. 158-159), and subsequently submitted to a long recorded interview (Tr. 174-175). The Internal Revenue Agent completed his examination and wrote his report in 1955 (R. 25-26). The Special Agent spent the major part of his time on

the case in 1955, a small amount of time in 1956 and concluded his investigation in May, 1957 (R. 28-30). The case was reviewed by the Internal Revenue Service in October, 1957, and was sent to the Department of Justice for prosecution in July, 1958 (R. 33-36). The indictment was not returned until February 5, 1959, the day it was presented to the grand jury (R. 37).

The Court below, in affirming the conviction, held that since petitioner denied evil motive and intent, the issue resolved was whether the incorrect statements of income in the returns were the result of unintentional error or the result of a tax evasion motive and that accordingly there was no basis for the submission of lesser offense instructions under Section 145 (a) of the 1939 Internal Revenue Code. It found that the instruction pointing out the defendant's special interest in the case is proper under **Reagan v. United States**, 1895, 157 U. S. 301, 310, and did not destroy the statutory competency of his testimony. It also concluded that petitioner had little standing to complain of the period of investigation and that any delay was not unreasonable because of the magnitude of the task in reconstructing petitioner's income and the absence of intentional delay or of unreasonable harassment of the defendant.

REASONS FOR GRANTING THE WRIT.

1. This case raises an important question concerning Rule 31 (c) of the Federal Rules of Criminal Procedure, the determination of what is an offense "necessarily included in the offense charged," as well as the distinction and relationship between the major and lesser internal revenue crimes.

Section 145 (a) creates four misdemeanor offenses. It makes it an offense to fail to pay a tax, to fail to make a return for the purpose of a computation, assessment or

collection of a tax, to fail to keep records for tax purposes, and to fail to supply information for such purposes, provided that such acts are wilful. Section 145 (b) makes it a crime to willfully attempt to defeat a tax in any manner.

Petitioner, charged with wilful attempt to evade taxes by filing fraudulent returns, asked the Court to instruct the jury that he might be convicted of a lesser included offense under Section 145 (a) of the 1939 Internal Revenue Code, requesting instructions which would have authorized a conviction of the misdemeanor of wilful failure to supply correct information, willful failure to keep records, wilful failure to pay the correct tax, and instructions combining these theories. The Court below, concluding that "the crucial element in determining whether the lesser offenses of § 145 (a) are 'necessarily included' in the felony charged, turns upon the language of the indictment," held such instructions were not required because the charge and the focal issue involved an affirmative act, wilfully filing fraudulent returns, considerably different from the mere failures or omissions involved in the misdemeanor and that, since "defendant's dereliction did not constitute a failure or omission", the record offered no basis for such submissions.

The view of the Court below that a "necessarily included" offense is determined by the allegations of the indictment finds support in **Gaunt v. United States**, 1 Cir., 184 F. 2d 284, 289-290. See also **Stapleton v. Commonwealth**, 140 Va. 475, 124 S. E. 237. It rejects the narrow concept that "the lesser [offense] must be such that it is impossible to commit the greater [offense] without first having committed the lesser" **Giles v. United States**, 9 Cir., 144 F. 2d 860, 861. The meaning of an "offense necessarily included in the offense charged" and the application of Rule 31 has never been decided by this Court.

Under either interpretation of Rule 31 (c), the misdemeanor of wilfully failing to supply information for the purpose of a tax computation is an "offense necessarily included in the offense charged", wilful attempt to defeat a tax by the filing of a false return. The omission of the allegations "attempt to defeat and evade" leaves the specific charge of wilfully filing a false return, an equivalent of wilfully failing to supply correct information. In any event, it is impossible to commit a violation of section 145 (b) without first violating some provision of section 145 (a). When the failure to supply correct information does not violate section 145 (a), then the falsity of the tax return cannot constitute one of the elements of attempt to evade by filing a false return. **United States v. McCue,** D. Conn., 160 F. Supp. 595. Significantly **Spies v. United States,** 317 U. S. 492 seems to hold that the felony under section 145 (b) includes one or more misdemeanors under section 145 (a) and that the latter offenses are embraced within the former.

The difference drawn between the felony and the misdemeanors by the Court below will not withstand analysis. There is no sharp line between the proof required for the misdemeanor and the proof needed for the felony. The same evidence may be the basis for the element of willfulness required by both crimes. Bad faith or evil motive is necessary for the requisite wilfulness in the misdemeanor, **United States v. Murdock,** 290 U. S. 389, 397-398, as well as for the felony. **Spies v. United States,** 317 U. S. 492; **James v. United States,** ... U. S. ..., 81 S. Ct. 1052. The difference in the wilfulness required is that the motive for the felony must include a purpose to evade a tax. **James v. United States,** supra (concurring and dissenting opinion of Mr. Justice Harlan). While it has been said that the felony embraces wilful commissions and the misdemeanor wilful omissions, **Spies v. United States,** 317 U. S. 492, the same evidence may be the basis

for a finding of a wilful commission or a wilful omission. The difference is dependent upon the conclusions which a jury draws from the proof. If a taxpayer omits an item or items of income, his conduct may constitute a wilful attempt to evade taxes, a wilful failure to supply information, or it may be conduct not amounting to a crime. In the first instance it is an affirmative act and an aggravated crime and in the second an omission and a minor offense. The taxpayer's state of mind determines the quality of his conduct and this, in turn, may be inferred from the same evidence.

In the instant case, the core of the Court's instructions considered a wilful omission as "necessarily included" in the offense charged. The jury was required to determine if petitioner wilfully failed to supply information and, if it made this finding, to decide further whether such failure was wilfully done in an attempt to evade taxes (Tr. 1307). The trial judge thus considered the felony as an aggravated form of the misdemeanor and also concluded that the record would support a lesser offense instruction. This view was supported by the proof. As a matter of law, it cannot be said that petitioner's motive as inferred from the evidence only established the requisite wilfulness for the felony and not for the misdemeanor. The jury could have concluded that petitioner's conduct merely constituted wilful omission and that his motive, though an evil one, lacked a tax evasion purpose. While the jury may have determined that petitioner's state of mind did not include a tax evasion motive, it may have concluded that petitioner's manner of keeping records and preparing returns constituted wilful omissions.

The evidence showed, as the court below found, that petitioner failed to keep records and, consequently, supported an instruction upon the theory that he wilfully failed to keep records. The government's contention that

petitioner did not wilfully pay all the tax due would support an instruction upon the lesser charge of wilful failure to pay.

While the statute of limitations had passed on the lesser crimes, we do not think that the Government can avoid a lesser offense instruction by delaying the prosecution until the prosecution period expires. See 26 U. S. C., former § 3748 (a) and 26 U. S. C., § 6531. Such procedure would deny the defendant a substantial right by the Government's delay in bringing about an indictment. The purpose of the statute of limitations is to protect the accused from a stale prosecution, to assist the defendant and not the government. Accordingly, the prosecution should not be allowed to use the statute for the purpose of defeating the rights of an accused. Contra **Chaifetz v. United States**, D. C. Cir., 288 F. 2d 133. If a defendant specifically requests a lesser instruction, otherwise barred by limitations, he should be entitled to such instruction and should not be allowed to complain subsequently if the jury so finds him guilty and he is punished thereunder.

Defendant requested the Court to allow the jury to choose between these misdemeanors and the felony. Whenever there is evidence to show either a felony or one or more misdemeanors, the prosecuting officials should not have the sole choice of deciding the offense of which the accused may be found guilty. If there are several offenses possible under the evidence, and if there is a lesser offense embraced within a greater offense, a defendant should be entitled to a verdict of the jury on this issue in accordance with Rule 31 (c) of the Federal Rules of Criminal Procedure.

2. The Act of March 15, 1878, 20 Stat. 30, now 18 U. S. C., § 3481, removed the common-law disqualification for interest and made a defendant in a criminal case a competent

witness. Congress thus explicitly deemed interest in the outcome of a case no ground for disqualification, aiding innocence by giving an accused the opportunity to testify under oath. See **Ferguson v. Georgia**, ... U. S. ..., 81 S. Ct. 756, 760. Implicit in this statute is a command that this right may not be defeated by instructions that a defendant may be disbelieved because of his interest.

In 1895, in **Reagan v. United States**, 157 U. S. 301, this Court, doubtlessly still under the influence of the common law interest rule, approved an instruction which permitted the judge to instruct the jury that, apart and distinct from other witnesses, the deep personal interest of a defendant may color his testimony. Subsequently **Allison v. United States**, 160 U. S. 203, cast doubt on the **Reagan** case by stating:

> "It was for the jury to test the credibility of the defendant as a witness, giving his testimony such weight under all the circumstances as they thought it entitled to, as in the instance of other witnesses, uninfluenced by instructions which might operate to strip him of the competency accorded by the law."

More recently in **Quercia v. United States**, 289 U. S. 466, in disapproving a crude commentary by a trial judge which was one-sided against a defendant, this Court quoted the above language from **Allison** and held that a trial judge may not single out a defendant's testimony and imply that it is not worthy of belief.

The instruction here given did strip petitioner of his competency as a witness. There was an intimation that petitioner was untruthful in his testimony in the charge that when a defendant takes the stand it is the jury's duty to remember "the very vital interest the defendant has in the outcome of the case", that the court does not imply that he "will naturally commit perjury", but that his

interest and bias are for the jury to consider and in considering his testimony "you are to consider the very vital interest which he has at stake in this case" (Tr. 1311). This instruction implied that the petitioner was to be disbelieved because he was the defendant. It defeated the purpose of the statute cited above by insinuating that the position of petitioner as a defendant deprived his testimony of credibility. And, even under the **Reagan** decision, the instant instruction was bad.

A defendant is not required to take the stand and no adverse inference may be drawn if he fails to do so. **Bruno v. United States**, 308 U. S. 287. We think also that when a defendant chooses to testify no adverse inference may be drawn from such an election. Permitting the Court to so instruct might influence a defendant to remain silent at his trial because his right to testify is partially defeated. Congress gave the accused the right to testify. An instruction of this nature is in disregard of that right.

This question is of importance in the administration of criminal justice as it is a common practice to single out the interest of a defendant who testifies as a witness. E. g. **United States v. Paccione**, 2 Cir., 224 F. 2d 801, 803; **United States v. Marshall**, 7 Cir., 266 F. 2d 92, 95; **Schaefer v. United States**, 8 Cir., 265 F. 2d 753, 754; **Stapleton v. United States**, 9 Cir., 260 F. 2d 415, 420

3. Petitioner was denied his right to a speedy trial by the failure of the government to cause a speedy indictment. Petitioner was indicted on February 5, 1959, five years after the criminal investigation was commenced (R. 27). The record showed that for a period of three to four years the criminal investigation was by choice either abandoned, allowed to lie dormant or was ensnarled in administrative red tape, that the investigation was completed in 1954 or 1955, with perhaps slight work done in 1956, that adminis-

trative procrastination began, that criminal prosecution was recommended by the criminal investigator in May, 1957, and that after more delay petitioner was indicted in February, 1959.

Unreasonable delay following the issuance of an indictment has been held to be a denial of the right to a speedy trial. Although few cases have considered the question whether the constitutional right to a speedy trial includes the right to a speedy indictment or information, there is no practical difference between pre-indictment and post-indictment delay.

It is true that the statute of limitations affords some protection to tardy indictments. But this is not the only safeguard afforded a defendant. The purpose of limitations is to create a cutoff date beyond which a prosecution may not be brought. It does not excuse all failures to prosecute. It is one thing to allow a prosecution if the government learns of the alleged crime shortly before the running of the statute of limitations. It is quite different to permit a prosecution to be delayed without just cause throughout that statutory period. Nor is this a case where the investigation continued throughout the entire statutory period.

In **Petition of Provoo**, D. Md., 17 F. R. D. 183, affirmed per curiam, 350 U. S. 857, a treason indictment, an offense with no limitation period, was dismissed when the delay was caused both by a prosecution in the wrong jurisdiction and by administrative procrastination. See **Pollard v. United States**, 352 U. S. 354, 362; **Taylor v. United States**, D. C. Cir., 238 F. 2d 259.

The record shows no excuse for delay. If criminal prosecution was intended, the matter should have been promptly presented to the grand jury in 1954 or 1955. An individual should not be required to live under the cloud of potential criminal prosecution. Justice requires diligence

in bringing charges. And, apart from the constitutional provisions, the fair administration of criminal justice required the dismissal of the indictment. See **McNabb v. United States**, 318 U. S. 332.

CONCLUSION.

For the foregoing reasons, this petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX.

Opinion.

UNITED STATES COURT OF APPEALS
for the Eighth Circuit.

No. 16,552.

Philip A. Foley, Appellant, vs. United States of America, Appellee.	Appeal from the United States District Court for the Eastern District of Missouri.

[May 12, 1961.]

Before SANBORN, VAN OOSTERHOUT, and MATTHES, Circuit Judges.

MATTHES, Circuit Judge.

On February 5, 1959, Philip A. Foley, hereinafter referred to as "defendant," was indicted in two counts for attempting to evade and defeat income tax due and owing by him and his wife for the years 1952 (Count I) and 1953 (Count II) by filing false and fraudulent joint income tax returns. The indictment alleged that the 1952 return showed a net income of $4,053.27, and a tax due thereon of $500.22, whereas the true net income for that year was

$8,684.78, upon which there was owing a tax of $1,597.66;[1] that the return for 1953 showed a net income of $4,231.34, and a tax due thereon of $672.96, whereas the true net income for that year was $11,805.60, with a tax owing thereon of $2,627.62.[2]

After a jury trial of nine days, the defendant was found guilty on both counts and thereafter sentenced to a prison term of three years under each count to run and terminate concurrently, and was fined $2,500 under each count, or a total of $5,000.

On this appeal the defendant does not challenge the sufficiency of the evidence to sustain the conviction, therefore a detailed resume of the evidence is unnecessary. We have examined and considered the voluminous record, consisting of six volumes of testimony, and find that the factual statement appearing in defendant's brief fairly and accurately summarizes the pertinent and relevant evidence.

The defendant is a lawyer, and has been engaged in the practice of his profession, with offices in Clayton, St. Louis County, Missouri, since 1926, when he was admitted to the bar. He could properly be described as a general practitioner and while he was admitted to practice before the Treasury Department, the bulk of his practice consisted of divorce cases and the defense of persons accused of crimes.

Concededly, the defendant failed to keep adequate records for the purpose of recording his income and deductible ex-

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[1] Evidence established proof of $8,036.04 net income with tax due of $1,438.06 for 1952.

[2] Evidence established proof of $9,700.89 net income with tax of $2,017.26 for 1953.

The indictment charged violations of §145(b) of the 1939 Internal Revenue Code (§7201 of the 1954 Code). "Any person * * * who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony, * * *"

penses; rather, he relied upon his memory and bank book which disclosed his deposits. Apparently he would total the deposits for the year, deduct therefrom items which were not taxable, such as amounts due clients included in the deposits and then he would add an arbitrary amount which ran between $1,500 and $2,100 estimated by him to represent cash receipts. In order to reconstruct the true income, the Government brought into court numerous former clients of the defendant who testified as to the amounts paid by them. Of the total of 130 witnesses who testified in behalf of the Government, 113 were former clients and others called to establish legal fees paid to defendant during the two years in question. There were, in addition, stipulations received in evidence of 58 other clients who had paid defendant legal fees during the period under consideration. It was also stipulated that 7 attorneys who had officed in the same suite with defendant, paid defendant $2,254.63 in 1952 and $2,637.69 in 1953, as their share of rent, secretarial assistance and office expense. None of the amounts so received by defendant was reported as gross income, but it appears that defendant deducted as a business expense only his share of these expenses, the amount not covered by payments from other attorneys.

The trial of the case was somewhat unusual, in that with the exception of one Roy Graham, there was no effort made by defendant to discredit any of the witnesses or their testimony. Thus, the issue which was litigated and resolved by the jury was whether the misstatement of income was the result of unintentional error or mistake on the part of one wholly unfamiliar with the exacting requirements of the revenue laws, as contended by defendant, or whether the defendant filed false and fraudulent returns for the purpose of evading taxes, which was the Government's position throughout the trial.

Graham, the controversial witness, was a professional bondsman and he also operated a tavern known as

"Graham's Grill." Until about August, 1953, Graham and defendant were close friends. During the year 1952 Graham gave defendant five checks totaling $2,837.35, and in 1953 five checks totaling $3,154.38. Graham testified that defendant had represented him and taken care of his legal matters since 1933, without compensation; that in 1952 Graham found himself in a financial position where he was able to pay defendant for past services, and although not requested by defendant to do so, Graham paid defendant the amounts represented by the checks above mentioned. Graham emphatically denied that he had a partnership arrangement with defendant whereby the latter was to receive one-half of the net income derived by Graham from signing appearance bonds. On the other hand, defendant's version was that he had been instrumental in procuring bond business for Graham, in that he had, in early 1952, prevailed on the Sheriff of St. Louis County, Missouri, to permit Graham to sign appearance bonds; that in consideration for this service Graham had agreed to split all net bond income with the defendant, that is, all expenses were to be first deducted, and, as an additional consideration, Graham agreed to pay defendant's share of the tax on the income received by the latter.[3]

Not only did defendant fail to report the income so received from Graham, but concededly he did not deposit any of the checks in his bank account. Defendant testified that Graham gave him small amounts of cash from time to time, and each time defendant received a check, he would endorse it and Graham would give him the cash difference above those sums previously advanced. Graham made a record of the checks so furnished and endorsed them. "Graham's

[3] Defendant testified that one of the 1953 checks, in the amount of $1,000 was endorsed and returned to Graham in consideration for a $937.50 check of Foley's, payable to Foley's secretary, which had been cashed for her by Graham. Both she and defendant testified that this represented back salary due her.

Grill," after which they were deposited in Graham's bank account. Graham did not produce any of his records at the trial, claiming that they had been destroyed after the records had been fully and completely investigated and checked by the Internal Revenue Service and after Graham had paid additional taxes on his income.

The third point briefed and presented by defendant which we shall first consider, goes to the failure of the district court to dismiss the indictment. By a pre-trial motion upon which evidence was heard, the defendant urged that the indictment of defendant shortly before expiration of the statute of limitations and the unreasonable delay in presenting the matter to the grand jury, constituted a deprivation of defendant's right to a speedy trial in violation of the Sixth Amendment.[4] Defendant also relies upon Rule 48(b) of the Federal Rules of Criminal Procedure, which provides:

> "If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint."

The rule is firmly established that the protection afforded by the Sixth Amendment has no application until after a prosecution is instituted, and here the defendant concedes there was no delay in bringing him to trial subsequent to the time the indictment was filed. See *Hoopengarner* v. *United States*, 6 Cir., 270 F.2d 465, 469; *D'Aquino* v. *United States*, 9 Cir., 192 F.2d 338, 350, cert. den., 343 U.S. 935.

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[4] The Sixth Amendment provides that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial

Neither do we find any substance in the contention that there was unnecessary delay in presenting the charge to the grand jury within the purview of Rule 48(b).[5] On this score the defendant's argument is that the rule was violated inasmuch as the criminal investigation was commenced in the early part of January, 1954, but the indictment was not returned until February 5, 1959, and that the lapse of approximately five years constituted an unusual and unnecessary delay. He points to evidence taken upon the hearing of the motion to dismiss tending to prove that the investigation was completed in 1954 and 1955, urging that the case was allowed to lie dormant, was abandoned or ensnarled in administrative proceedings thereafter.

Under the facts as developed in the trial, we conclude that defendant has little standing to complain of the period of investigation and certainly if there was a delay, we find no justification for holding that it was unreasonable. From the factual background which we have previously summarized, it is obvious that investigation and preparation for presentment of the indictment was of necessity a commodious task. The defendant failed to turn over any books or records to the investigating agents and it became necessary for them to reconstruct defendant's income for the taxable years in question. From the nature of defendant's law practice, this required locating and interviewing former clients who had paid fees during the years in question. Some of these clients were de-

[5] The indictment was returned within the period of the statute of limitations. Title 26 U.S.C.A. § 6531 provides:

"No person shall be prosecuted, tried or punished for any of the various offenses arising under the internal revenue laws unless the indictment is found or the information instituted within 3 years next after the commission of the offense, except that the period of limitation shall be 6 years * * *

"(2) for the offense of wilfully attempting in any manner to evade or defeat any tax or the payment thereof;"

ceased, many had removed themselves from the State of Missouri, several of the divorce clients had re-married, and in many cases, it was necessary to establish individual fee payments through the testimony of two or more witnesses. The magnitude of the Government's task is illustrated by the large number of witnesses who were called to testify regarding payments made to defendant and by the stipulations of many others which were entered in the record. There is no evidence of intentional or vexatious delay on the part of the Government or of unreasonable harassment of the defendant. We have considered the cases of *Petition of Provoo* (D. Md.), 17 F.R.D. 183, affirmed *per curiam*, 350 U.S. 857, and *Taylor* v. *United States* (D.C. Cir.), 238 F.2d 259, which are relied on by defendant. They are clearly distinguishable, involve elements not present in the circumstances here, and cannot be controlling. The suggestion is made that in prosecutions for tax evasion a defendant is generally punished more by the harassment and anxiety before trial than by the sentence following conviction, and that here "the defendant has had potential charges of tax evasion hanging over his head since 1954." As we have observed, there is no proof of harassment. Anxiety might result from the knowledge that the Government is investigating the financial affairs of a taxpayer and this anxiety might hang as a "Sword of Damocles." Nevertheless, such emotional disturbance without more is no legal justification for permitting the accused to escape prosecution. Furthermore, motions to dismiss for lack of prosecution are addressed to the sound discretion of the trial judge and under the circumstances here we find absolutely no basis for ruling that there was an abuse of discretion in denying defendant's motion to dismiss the indictment. *United States* v. *McWilliams* (D.C. Cir.), 163 F.2d 695; *United States* v. *Research Foundation* (S.D.N.Y.), 155 F.Supp. 650, 654, 656.

Without meaning to downgrade other claims of error, it is apparent to us that defendant's main point is that the trial court erred in refusing to instruct on lesser offenses under § 145(a) of the Internal Revenue Code of 1939 which, in summary, provides that willful failure to pay taxes, make returns or declarations, keep records, or to supply information are misdemeanors. Defendant offered instructions which would have authorized a conviction of the misdemeanors of willful failure to supply correct information, willful failure to keep records and failure to pay the correct tax, the theory being that these misdemeanors are necessarily included as lesser offenses of § 145(b) within the meaning of Rule 31(c), Federal Rules of Criminal Procedure.[6]

We approve the court's action in refusing to instruct on the lesser offenses. It will be seen that subsection (a) of § 145 deals with willful failure and omissions, whereas subsection (b) is designed to punish for willful attempts to evade or defeat a tax. Here defendant's dereliction did not constitute a failure or omission—he was charged with the affirmative act of filing false and fraudulent returns for a purpose proscribed by § 145(b). It is apparent that *Spies* v. *United States*, 317 U.S. 492, upon which the defendant relies, does not control the question before us. In *Spies*, the indictment charged a willful attempt to defeat and evade the tax by willfully *failing to file a return* and willfully *failing to pay the tax* as the means to the felonious end. The case was reversed upon the ground that an improper and incomplete instruction had been given upon the felony charge, inasmuch as the trial court had refused to instruct that an affirmative act was necessary to convict

[6] Rule 31(c) provides: "The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense."

under § 145(b). In ruling, in effect, that two misdemeanors under § 145(a) do not automatically constitute or prove the felony proscribed by § 145(b), the Supreme Court recognized the principle that a felony may, and frequently does, include lesser offenses, and that "this felony may include one or several of the other offenses against the revenue laws." 317 U.S. at p. 497. Of significance here is the pronouncement at pp. 498-499:

> "The difference between the two offenses [§ 145(a) and § 145(b)], it seems to us, is found in the *affirmative action* implied from the term 'attempt,' as used in the felony subsection. * * * We think that in employing the terminology of *attempt* to embrace the gravest of offenses against the revenues, Congress intended some willful commission in addition to the willful omissions that make up the list of misdemeanors. Willful but passive neglect of the statutory duty may constitute the lesser offense, but to combine with it a willful and positive attempt to evade tax in any manner or to defeat it by any means lifts the offense to the degree of felony." (Emphasis supplied).

There was no such error here in instructing upon the felony offense. The trial court carefully pointed out to the jury the necessity of a willful and affirmative attempt to evade taxes, cautioning that mere negligence or carelessness, the failure to keep books and records or the mere filing of a false or fraudulent return, or the willful failure to pay an income tax, were not of themselves sufficient to constitute an offense under the indictment.

To our mind, the crucial element in determining whether the lesser offenses of § 145(a) are "necessarily included" in the felony charged, turns upon the language of the indictment before us. The charge, and the focal issue, involved an affirmative act—whether the defendant *filed false*

and fraudulent returns, i.e., grossly understated and underreported his income, for the unlawful and felonious purpose of attempting to evade payment of income taxes. The Government's case did not rest upon willful failure to pay taxes, willful failure to keep records or willful failure to supply correct information. The defendant's trial position was that there was no intent to evade payment of taxes, that the underreporting of income resulted from carelessness and lack of knowledge of the requirements of the internal revenue laws and from the belief that the income defendant had received from Roy Graham was tax free. As observed, this issue was submitted to the jury in proper instructions.

This Court considered the question of lesser offense instructions in *Dillon* v. *United States*, 8 Cir., 218 F.2d 97, cert. granted, 349 U.S. 914 and dismissed, 350 U.S. 906, and *Janko* v. *United States*, 8 Cir., 281 F.2d 156, petition for certiorari pending, ruling in each instance that the lesser offense instructions were not justified by the facts. In *Dillon*, we carefully pointed out the distinction between omissions covered by § 145(a) and willful affirmative acts within the purview of § 145(b). Our ruling at p. 101 of 218 F.2d is apropos to the situation before us:

> "The indictment did not charge, nor did the evidence show, that defendant merely failed to pay a tax or failed to make a return. On the contrary, the evidence showed that a return was filed and a tax was paid. No evidence was offered that defendant failed to file a return or to show the willful failure to pay the tax when due, except insofar as willfulness was involved in the charged willful and felonious attempt to evade the payment of taxes owed. Hence the universal rule that it is not error to fail to instruct on an offense not presented by the evidence applies. There consequently was no error in failing to instruct that defendant might have been convicted of either

> of the misdemeanors defined by 7145(a), of willful failure to pay a tax when due or willful failure to file a return."

In *Janko*, supra, in considering the portent of the lesser offense section of the 1954 Code, 7203 [formerly 145(a)] and where the identical contention was presented, we reiterated the proposition that there is a considerable difference between mere failure or omission and affirmative acts committed for the graver purpose of attempting to evade taxes. See 281 F.2d at pp. 163, 164. See also, and compare *United States* v. *Kales*, 3 Cir., 214 F.2d 887, 890, 891, cert. den., 348 U.S. 887; *Lee* v. *United States*, 9 Cir., 238 F.2d 341, 346; *United States* v. *Jannuzzio* (D.C. Del.), 184 F.Supp. 460.

We have also given consideration to *United States* v. *McCue*, (D.C. Conn.), 160 F.Supp. 595, relied upon by defendant, which, to say the least, presented an unusual factual situation. There, after the indictment charging a felony under 7145(b) was filed, there were proceedings which led to the filing of an information charging defendant with the misdemeanor of willfully failing to supply correct information to the revenue department. A nolo contendere plea was accepted to the lesser offense and the defendant was fined and sentenced thereunder. After the defendant had paid his fine, and was serving under his term of probation, the Government, by further proceedings, apparently for the purpose of renewing prosecution under the indictment, sought to vacate the misdemeanor conviction under Rule 35 of the Federal Rules of Criminal Procedure. Admittedly, in ruling that further prosecution under the 7145(b) indictment was barred by principles of double jeopardy, the court used language which sustains defendant's position here. However, in view of the special situation there, and under the facts and circumstances presented by this record, we find *McCue* of no persuasion.

While there may be situations where a defendant charged under the felony section of the revenue laws is entitled to lesser offense instructions, we are convinced that there was no basis on this record for the submission of the lesser offenses as contained in the instructions which were offered by the defendant.

Our conclusions and disposition of the issue on the foregoing basis makes it unnecessary to rule upon the question of whether the court properly refused the lesser offense instructions on the theory that the misdemeanor violations were barred by the statute of limitations.

We have for final disposition the contention that the trial court committed prejudicial error in instructing the jury with respect to the defendant's credibility and the weight and effect of his testimony. The complained of instruction is set out in full in the margin.[7] More precisely, the defendant asserts that the court's charge in the respect noted constituted unfair infringement of his right to testify for himself as a competent witness and that the

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[7] The court's charge on this issue was as follows:

"When a defendant in a case of this kind takes the stand—which he has a perefect right to do—he is subjected to all the obligations of a witness, and his testimony is to be treated like the testimony of any other witness; that is to say, it will be for you to say, remembering the matter of his testimony, and the manner in which he gave it, his cross-examination, and everything else in the case, whether or not he told the truth. Then, again, it is for you to remember--you have a perfect right to do so, and it is your duty to do so--the very vital interest the defendant has in the outcome of this case.

"Now, this does not mean, and I do not mean to imply that whenever a man is accused of a crime and takes the stand in behalf of himself, that he will naturally commit perjury; but, of course, as a defendant places himself as a witness upon the witness stand, he stands like any other witness.

"But, his interest, or bias, or anything else that may affect his testimony, is a matter which, of course, you as jurors should consider. Therefore, I say to you, in considering the testimony of the defendant, you are to consider the very vital interest which he has at stake in this case."

instruction effectively destroyed the presumptive competency of his testimony.[5] The argument is that since a defendant is not required to take the stand, no adverse inference may be drawn if he fails to do so, and that likewise, when a defendant elects to testify, no adverse reflection may be drawn from such an election.

Emphasized here is the assertion that the instruction was improper because it directed the jury's attention to "the very vital interest the defendant has in the outcome of this case," and the alleged intimation to the effect that defendant would "naturally commit perjury." It has long been recognized that while a court "is not at liberty to charge the jury directly or indirectly that the defendant is to be disbelieved because he is defendant," an instruction may properly point out the defendant's special interest in the case. *Reagan* v. *United States*, 1895, 157 U.S. 301, 310. The Government has cited numerous cases where instructions pointing out the special character of a defendant's testimony have been ruled proper. In this Circuit, see *Schaefer* v. *United States*, 8 Cir., 265 F.2d 750, 754, cert. den., 361 U.S. 844; *Shoulders* v. *United States*, 8 Cir., 218 F.2d 290, 292, 293.

Neither are we persuaded that the trial court's reference to perjury constituted error. When the charge is read as a whole, it appears that this statement was introduced perhaps in an excess of caution on the part of the trial judge. Certainly there is nothing in the instruction which disparages, ridicules or downgrades the competency of defendant's testimony. While the reference to perjury was unnecessary, defendant has failed to demonstrate

[5] Title 18, U.S.C.A. §3481 provides:

"In trial of all persons charged with the commission of offenses against the United States * * * the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him."

that he was thereby prejudiced. As observed, there was very little, if any, controversy with respect to the facts—the overwhelming evidence was in the main uncontradicted by the defendant and aside from the conflict with regard to Graham's testimony, the main thrust of defendant's testimony was to establish his lack of knowledge of bookkeeping, the tax laws, etc., and to deny evil motive and intent.

On examination of the entire proceedings, we are convinced that defendant has received a fair and impartial trial.

The judgment is

Affirmed.

A true copy.

Attest: Robert C. Tucker,

Clerk, U. S. Court of Appeals, Eighth Circuit,
By Lillian W. McDermott,
Chief Deputy Clerk.

Judgment.

United States Court of Appeals
for the Eighth Circuit.

No. 16,552. September Term, 1960.

Philip A. Foley,
Appellant,

vs.

United States of America.

Appeal from the United States District Court for the Eastern District of Missouri.

This Cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the defendant in the said District Court, Philip A. Foley, do surrender himself to the custody of the United States Marshal for the Eastern District of Missouri, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after the date of the filing of the mandate of this Court in the said District Court.

May 12, 1961.